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IN THE

Supreme Court of the United States

October Term, 1946

No. 768

LINCOLN STORES, INC.,

Petitioner,

vs.

NASHUA MANUFACTURING COMPANY,

Respondent.

**PETITION OF LINCOLN STORES, INC. FOR A WRIT
OF CERTIORARI TO THE CIRCUIT COURT OF
APPEALS FOR THE FIRST CIRCUIT, AND BRIEF
IN SUPPORT THEREOF.**

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INDEX

	PAGE
Summary and short statement of the matter involved.....	2
Reasons relied upon for the grant of a writ of certiorari	7
Brief in support of petition for certiorari.....	9
Opinions of the Courts below.....	9
Jurisdiction	9
Statement	10
Specification of errors.....	10
Summary of argument.....	10
Argument	11

POINT I—Because the Court of Appeals for the First Circuit, in both the majority and minority opinions, has virtually invited this Court to finally settle a proposition of patent law as to which the authorities—including the decisions of this Court—are in irreconcilable conflict	11
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POINT II—Because the majority opinion of the Court of Appeals has sustained a patent as valid upon doubtful acceptance of a <i>procedural</i> rule as paramount to an otherwise controlling <i>rule of law</i> established by this Court as early as 1850, and consistently applied by this Court as well as by the lower Courts since that date	13
--	----

POINT III—Because the Court of Appeals, in effect, has sustained as valid a patent which has been interpreted to differ what preceded it only in *degree* and not in *species or kind*, and therefore has rendered a decision which is in direct conflict with the applicable decisions of this Court 16

POINT IV—Because the Court of Appeals has sustained as valid patent claims that fail to make the “full, clear, concise and exact” description of the alleged invention required by Section 4888 of the Revised Statutes (35 U. S. C. 33), as that Statute was interpreted by this Court in *General Electric v. Wabash*, 304 U. S. 364; *United Machine Co. et al. v. Binney & Smith Co.*, 317 U. S. 218; and *Halliburton Oil Well Cementing Co. v. Walker*, Case 24, decided November 18, 1946. 17

POINT V—Because in rendering its majority opinion, the Court of Appeals has completely ignored the public interest, and has made possible the subjecting of the poorer members of the purchasing public to the necessity of paying patent tribute in order to acquire inexpensive wool-rayon blankets regarded by them as necessary for their health and comfort 20

Conclusion 21

List of Cases.

	PAGE
Corbett v. Halliwell, 123 F. (2d) 331.....	11
Continental Oil Co. v. Jones, 113 F. (2d) 557.....	11
Fond du Lac v. May, 137 U. S. 395.....	12
Galland-Henning Mfg. Co. v. Logemann Bros. Co., 142 F. (2d) 700	14
General Electric v. Wabash, 304 U. S. 364.....	3, 8, 19
Halliburton Oil Well Cementing Co. v. Walker, Case 24, decided Nov. 18, 1946	3, 8, 9, 19
Heald v. Rice, 104 U. S. 737.....	12
Hotchkiss v. Greenwood, 11 How. 248.....	16
May v. Juneau, 137 U. S. 408.....	12
Market v. Rowley, 155 U. S. 621.....	12
Munsey Gear Works, Inc. v. Outboard Marine, 315 U. S. 759	20
Prepayment Car Sales v. Orange County Traction Co., 221 F. 939	12
Smith v. Goodyear Dental Vulcanite Co., 93 U. S. 486....	16
United Carbon Co. et al. v. Binney & Smith Co., 317 U. S. 218	8
United States v. Protsch, 137 F. (2d) 92.....	11
United States Industrial Chemicals v. Carbide & Chem- ical Co., 315 U. S. 366.....	9
Walker on Patents, Deller Edition, Section 29, p. 179....	17

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PETITION OF LINCOLN STORES, INC. FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

*To the Honorable, The Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Your petitioner, LINCOLN STORES, INC., respectfully prays for a writ of certiorari to the Circuit Court of Appeals for the First Circuit to review the judgment of that Court entered on the 19th day of July 1946 (petition for rehearing denied October 7, 1946).

A transcript of the record in the case, including the proceedings in said Circuit Court of Appeals, is furnished herewith in accordance with the rules of this Court.

Summary and Short Statement of the Matter Involved.

1. Respondent, NASHUA MANUFACTURING COMPANY, a corporation of New Hampshire, is the owner of Amory Patent No. 2,208,533, granted July 16, 1940, for alleged invention in "Household Blanket".

2. Petitioner, LINCOLN STORES, INC., a corporation of Massachusetts, operates stores for retail sale to the purchasing public of various commodities, specifically including household blankets which it purchases from blanket manufacturers. The sale by Petitioner, at its store at Waltham, Massachusetts, of a blanket purchased from Marshall Field & Company, was charged by the complaint in this cause as an act of infringement of Respondent's patent. Marshall Field & Company openly defended the case.

3. Practically since the beginning of the blanket industry wool has been regarded as the most desirable material from which to weave blankets. This has been because of the inherent warmth and durability of wool fibers, as well as their susceptibility to treatment, *e. g.* "napping" (mechanically pulling some of the fibers into a substantially upright position), to give the surface of the blankets a soft feeling and a pleasing appearance and improve its insulating qualities. However, wool was notoriously far more expensive than other available fibers, so that for many years it had been the practice to mix fibers of other material with the wool fibers in forming the yarn used to weave the blankets, in order to reduce the cost of blankets to the purchasing public. To this end it was customary to substitute for wool fibers as much fibers of other material as could be used without too greatly decreasing the warmth,

strength, and durability of the blanket, or too greatly affecting the pleasing feeling and appearance thereof.

4. Among the many non-wool fibers that were extensively used for many years for this purpose was the so-called artificial or synthetic fiber produced from rayon; and wool-rayon blankets were extensively marketed and were fully described in printed publications many years prior to the Amory invention.

5. These prior wool-rayon blankets were made in accordance with the same procedure and on the same weaving machines theretofore used in the fabrication of blankets; and the rayon fibers employed were of *varying* short lengths, as distinguished from *uniform* short lengths.

6. The invention found for the Amory patent in suit, by which it is purported to distinguish from the prior art, is the use of "staple" rayon fiber mixed with wool fiber, woven in accordance with the same processes and on the same machines as theretofore used; and the Courts below interpreted the term "staple" to mean "fibers of a predetermined *uniform* length" (R. 411).*

* Factually, the Armory patent gives no definition of the term "staple", and the specifications of the patent negate the Courts' definition thereof because not only are the claims in suit silent as to the fiber *length*, but the only instruction contained in the specification with respect thereto is that found in column 2, page 1, line 45 of the patent (R. 265) that—

"* * * the filling wrapping should include a *substantial proportion* of fibers of a length of $1\frac{1}{2}" \pm \frac{1}{2}"$ in order to secure an adequate number of ends to provide the desired nap of the invention".

This means that the fibers could be from one to two inches long—a variation of 100%. And there is no information whatever as to what constitutes a "*substantial proportion*" of the short length fibers (Cf. *General Electric v. Wabash*, 304 U. S. 364; *Halliburton Oil Well Cementing Co. v. Walker*, Case No. 24, decided Nov. 18, 1946). Thus it is evident that the patent is fatally indefinite at the exact point of alleged novelty thereof.

7. Therefore, the only novelty found for the Amory patent is the use of rayon fibers of *uniform* short length in the same manner and for the same purpose that rayon fibers of *non-uniform* short length theretofore had been used.

8. The District Court concluded that this constituted "invention", and with obvious uncertainty as to whether or not such conclusion constituted a *finding of fact* or a *conclusion of law*, the District Court made both a finding and a conclusion with respect thereto (Finding 26, Conclusion 2, R. 40).

9. The affirming majority opinion of the Court of Appeals expressly stated its uncertainty (because of the many conflicting opinions thereon) as to whether the question of "invention" is one of *fact* or of *law* (R. 422), and with an implied doubt as to the soundness of considering the question as one of *fact*, stated (R. 422) that "*Until advised to the contrary by the Supreme Court*" it would treat the question as one of *fact*, and therefore it was "*impossible*" for the Court to reach a conclusion differing from that of the District Court because of the exacting requirement of Rule 52(a) of the Federal Rules of Civil Procedure.

10. On the other hand, the dissenting opinion of Judge WOODBURY, while also implying the same uncertainty on this question, reached the conclusion that even if "invention" is a question of *fact*, and found as a fact by the District Court to be present in the Amory patent, nevertheless, controlling propositions of *law* must thereafter be considered and applied if applicable; and that the present case was controlled by the rule of law, established in 1850 by this Court, that no *patentable* invention was involved in the mere substitution of one known material for another, where-
by the only asserted difference is one of degree, as dis-

tinguished from one of *species or kind*. Judge WOODBURY stated (R. 424):

"Thus I conclude, as my associates do, that Amory's contribution consisted in the substitution of one known material for another in an old combination. My disagreement in this case stems from my inability under these circumstances to reconcile the finding of invention made below with the rule of law enunciated by the Supreme Court in 1850 in the case of *Hotchkiss v. Greenwood*, 11 How. 248, since in my view Amory's substitution of materials did not produce a rayon blanket different in kind or species from those which had preceded it (*Smith v. Goodyear Dental Vulcanite Co.*, 93 U. S. 486, decided in 1876, see also our opinion on rehearing in *Grand Paper Box Co. v. Russell Box Co.*, decided April 17, 1946); but only produced a better rayon blanket than had previously been known.

• • • • •
 "Hence I conclude that Amory's substitution of materials produced a rayon blanket differing from earlier ones in degree of excellence only—that Amory's substitution only accentuated desirable qualities possessed to less degree by the rayon blankets of the prior art—and thus that his patent is invalid under the rule of *Hotchkiss v. Greenwood*, *supra*." *

11. Thus, by an unrealistic and strict application of a *procedural* rule, made applicable solely because of expressed doubt as to a *rule of law*, a decision has been rendered by the majority of the Court below which ignores the *law* applicable to the facts of the case as established by decision of this Court long prior to the adoption of the Federal Rules of Civil Procedure, which *law* the Federal Rules of Procedure, neither by language nor inference, purported to disturb.

* Emphasis ours throughout this Petition and Brief.

12. The adoption by the Court of Appeals of a definition of the term "staple" as used in the claims of the Amory patent, which definition is not contained in the patent itself, necessarily has rendered the claims vague and indefinite and violative of Section 4888 of the Revised Statute (35 U. S. C. 33) in that the claims require, at the precise point of novelty, a yarn composed "*essentially* of randomly intermingled staple artificial fibers". As pointed out in the footnote on page 3 hereof, the only information contained in the patent specifications as to fiber length is that there should be "a substantial proportion" of fibers of from 1" to 2" in length. It is inevitable that the *non-uniform*, short rayon fibers of the art prior to the patent included *some* fibers—and undoubtedly a very great many—of a length between 1" and 2". Therefore, in order to determine the limit of the monopoly of the patent claims as construed by the opinion of the Court of Appeals, and ascertain what is outside of the claim and in the public realm free for use by anyone, it is necessary to determine *how many* fibers of length of from 1" to 2" are necessary in order to have a yarn composed "*essentially*" thereof; or to constitute "*a substantial proportion*" of the fibers present in the yarn. *The Amory patent is entirely devoid of any statement, information or instruction on the subject.*

13. Practically, and as a matter of fact, the length of the rayon fiber (within much wider limits than here is pertinent) is quite immaterial because, when the blanket is "napped" to form the "lofty, homogeneous nap throughout the area and napped thickness of the blanket on both sides thereof" as recited in the claims, it is inevitable that the fibers are so cut and broken up as to make absolutely indistinguishable a blanket made from *uniform* rayon fibers from a blanket made from *non-uniform* fibers (R. 244, 254, 255).

14. In consequence, an unwarranted patent monopoly thus has been established which dominates and materially affects the health and comfort of the public, and particularly that portion of the public which depends upon the use of wool-rayon blankets for health and comfort because of their cheapness, as compared with blankets of other types.

Reasons Relied Upon for the Grant of a Writ of Certiorari.

The discretionary power of this Court is invoked upon the following grounds:

1. Because the Court of Appeals for the First Circuit, in both the majority and minority opinions, has virtually invited this Court to finally settle a proposition of patent law as to which the authorities—including the decisions of this Court—are in irreconcilable conflict.

2. Because the majority opinion of the Court of Appeals has sustained a patent as valid upon doubtful acceptance of a *procedural rule* as paramount to an otherwise controlling *rule of law* established by this Court as early as 1850, and consistently applied by this Court as well as by the lower Courts since that date.

3. Because the Court of Appeals, in effect, has sustained as valid a patent which has been interpreted to differ from what preceded it only in *degree* and not in *species or kind*, and therefore has rendered a decision which is in direct conflict with the applicable decisions of this Court.

4. Because the Court of Appeals has sustained as valid patent claims that fail to make the "full, clear, concise and exact" description of the alleged invention required by Section 4888 of the Revised Statutes (35 U. S. C. 33), as that

Statute was interpreted by this Court in *General Electric v. Wabash*, 304 U. S. 364; *United Carbon Co. et al. v. Binney & Smith Co.*, 317 U. S. 218; and *Halliburton Oil Well Cementing Co. v. Walker*, Case 24, decided November 18, 1946.

5. Because in rendering its majority opinion, the Court of Appeals has completely ignored the public interest, and has made possible the subjecting of the poorer members of the purchasing public to the necessity of paying patent tribute in order to acquire inexpensive wool-rayon blankets regarded by them as desirable or necessary for their health and comfort.

WHEREFORE your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Court, directed to the United States Court of Appeals, for the First Judicial Circuit, commanding said Court to certify and send to this Court, on a date to be designated, a full transcript of the record and all proceedings of the Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court as to the questions herein presented, and that the judgment of the Court of Appeals be reversed insofar as it has sustained claims 7 and 16 of Armory Patent No. 2,208,533; and that petitioner may be granted such other and further relief as may seem proper.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below.

The District Court filed no opinion, but on June 22, 1945 entered Findings of Fact and Conclusions of Law (R. 31), which were augmented by additional Findings and Conclusions on August 7, 1945 (R. 41).

The opinion of the Court of Appeals for the First Circuit is reported in 157 F. (2d) at page 154; and will also be found beginning at page 407 of the record.

Jurisdiction.

The grounds for jurisdiction are:

1. The date of the judgment to be reviewed is July 19, 1946. Petition for rehearing was denied October 7, 1946.
2. The judgment was rendered in a civil action brought under the patent statutes to determine the issues of validity and infringement of Letters Patent of invention.
3. The statute under which jurisdiction is invoked is 240(a) of the Judicial Code, 28 U. S. C. A. 347, as amended by the Act of February 13, 1925.
4. Two of the many cases believed to sustain the jurisdiction are *United States Industrial Chemicals v. Carbide & Carbon Chemicals Corp.*, 315 U. S. 663, and *Halliburton Oil Well Cementing Co. v. Walker*, Case No. 24, decided November 18, 1946.

Statement.

The facts are sufficiently stated in the petition.

Specification of Errors.

The errors which petitioner will urge if the petition for certiorari is granted are that the Circuit Court of Appeals for the First Circuit erred:

1. in sustaining claims 7 and 16 of Amory Patent No. 2,208,533 as valid and infringed.

2. in holding, in effect, that the substitution of one material for another whereby there is obtained a mere difference in degree, as distinguished from a difference in species or kind, constitutes a patentable invention.

3. in holding that the Amory patent, as interpreted by the Court, complied with R. S. 4888.

4. in holding, in effect, that invention is a question of *fact* as distinguished from a question of *law*, whereby the provision of Rule 52(a) of the Federal Rules of Civil Procedure is paramount to and takes precedence over all other considerations and legal principles.

5. in failing to reverse the judgment of the District Court, and direct the dismissal of the complaint.

Summary of Argument.

The points of argument follow the reasons relied upon for the grant of a writ of certiorari, and are stated on pages 7 and 8 of the petition, as well as in the index hereto. For the sake of brevity they are omitted at this point.

POINT I.

The Court of Appeals, in both its majority and minority opinions, has virtually invited this Court to finally settle a proposition of patent law as to which the authorities—including the decisions of this Court—are in irreconcilable conflict.

Whether or not “invention” is disclosed in a patent grant is either a question of *fact* or a question of *law*. If it is a question of *fact*, then, according to the provision of Rule 52(a) of the Federal Rules of Civil Procedure, the finding of that *fact* by a District Court, “shall not be set aside unless clearly erroneous”. Many of the Courts of Appeals have construed this rule as meaning that a *finding of fact* by a District Court may not be considered to be “clearly erroneous” if there is “substantial evidence” in the record supporting the District Court’s finding.*

Thus, in the present case, and regardless of what individually and independently each may have thought on the subject, the Judges constituting the majority of the Court of Appeals below believed themselves to be *foreclosed* by the finding of fact by the District Court that the Amory patent disclosed “invention”.

However, the majority opinion expressly stated (R. 422):

“Whether the question of invention is one of fact or of law is not too clear on the authorities; this uncertainty is indeed not entirely dispelled by consideration of decisions of the Supreme Court.”

* See, for example, *Corbett v. Halliwell*, 123 F. (2d) 331, C. C. A. 2; *U. S. v. Protsch*, 137 F. (2d) 92, C. C. A. 2; *Continental Oil Co. v. Jones*, 113 F. (2) 557, C. C. A. 10.

Thereupon, after reviewing two comparatively recent decisions of this Court in which this question was not specifically an issue before the Court, the majority opinion continues:

"Until advised to the contrary by the Supreme Court we shall so regard it" (as a question of fact). (Explanatory matter in parentheses ours.)

Similarly, Judge WOODBURY, writing the minority opinion of the Court, stated (R. 424):

"I am willing to agree with my associates in regarding the question of invention as one of fact until advised to the contrary by the Supreme Court."

Thereupon, he made reference to many authorities, including the decision of this Court in *Mahn v. Harwood*, 112 U. S. 354, 358, for the proposition that the presence or absence of "invention" is a question of *law*.*

Even the District Court in the present case expressed doubt on the question by both finding as a *fact* and concluding as a matter of *law* that claim 7 of the patent discloses invention (Finding 26, Conclusion 2, R. 40).

Of course, all members of the Court of Appeals below were keenly alive to the impact of this question on judicial determination in patent litigation. Indeed, Judge WOODBURY in his minority opinion pointed out tersely and effec-

* Indeed, this Court repeatedly has held that in a patent suit before a jury if, upon the state of the art as shown to exist by prior patents, it appears that the claims are not novel, as a matter of *law* a directed verdict for the defendant should be ordered by the Court. Of course, this could be done only because the question of "invention" is one of *law*. *Heald v. Rice*, 104 U. S. 737; *Fond du Lac v. May*, 137 U. S. 395; *May v. Juneau*, 137 U. S. 408; *Market v. Rowley*, 155 U. S. 621. To the same effect are countless decisions of the lower Courts. For example, see *Prepayment Car Sales v. Orange County Traction Co.*, 221 F. 939, C. C. A. 2.

tively one consequence of the acceptance of "invention" as a finding of *fact* in the sense and to the extent adopted by the majority opinion.

We interpret the foregoing statements in both of the opinions of the Court below not only as an invitation to this Court, but also as a *request* to this Court to review this case on this sharply defined and immeasurably important question; and we believe that this invitation, so requested by the entire Court below, was prompted by the awareness of that Court of the importance of specific consideration of this question, and decision thereon by this Court, to existing and future patent controversies.

It is submitted that the petition should be granted on this ground.

POINT II.

The majority opinion of the Court of Appeals has sustained a patent as valid upon doubtful acceptance of a *procedural* rule as paramount to an otherwise controlling *rule of law* established by this Court as early as 1850 and consistently applied by the lower courts since that date.

As stated in connection with the foregoing Point I, the majority of the Court below apparently believed that application of the provision of Rule 52(a) of the Federal Rules of Civil Procedure required acceptance by it of the District Court's finding of fact that the contribution to the arts by Amory, the patentee, constituted an "invention". As a result—and this also was tersely and most effectively pointed out in the dissenting opinion of Judge WOODBURY—the majority of the Court believed that it was thereby pre-

cluded from consideration of any other legal principles which might be applicable.* Therefore, the Court believed that the finding of fact was conclusive upon it because it was "impossible" for the majority of the Court "to say that the District Court was clearly erroneous in deciding that Amory had produced a patentable invention" (R. 422). However, *on the facts as agreed to by both the majority and minority opinions*, it is quite obvious that regardless of *any* finding of fact that may have been made by the District Court, a *rule of law* was established by this Court as early as 1850 that a valid patent may not issue for an alleged invention consisting of the mere substitution of one material for another to accomplish a mere difference of *degree* as distinguished from a difference in *species or kind*.

Thus, as a matter of convenience utilizing the minority opinion for a terse statement of what was agreed to by all of the members of the Court, we find Judge WOODBURY's statement (R. 424):

"Furthermore, *I agree with my associates' analysis of Amory's contribution*. That is to say, seeing nothing new in the warp threads which he used, in the way those threads were woven with his filling threads, in a filling thread consisting of a hard twisted core wrapped with slack twisted and undrafted artificial fibers, or in his napping process, I conclude that Amory's contribution was the use as wrapping for his filling threads of a large proportion of relatively coarse artificial fibers a substantial portion of which were uniformly $1\frac{1}{2}'' \pm \frac{1}{2}''$ long, i. e.,

* Compare the decision in *Galland-Henning Mfg. Co. v. Logemann Bros. Co.*, 142 F. (2d) 700 (C. C. A. 7th) in which the Court held (p. 702) that while the holding of *invention* by the lower Court was a finding of *fact*, the determination of whether such invention was *patentable* was a question of *law*. The majority opinion in the present case made no distinction between "invention" and "*patentable* invention".

staple rayon, a known material, whereas the prior art had used for that purpose artificial fibers of short but random lengths and denier, i. e., garnetted rayon, another known material. *Thus I conclude, as my associates do, that Amory's contribution consisted in the substitution of one known material for another in an old combination.* My disagreement in this case stems from my inability under these circumstances to reconcile the findings of invention made below with the rule of law enunciated by the Supreme Court in 1850 in the case of *Hotchkiss v. Greenwood*, 11 How. 248, since in my view Amory's substitution of materials did not produce a rayon blanket differing in kind or species from those which had preceded it, (*Smith v. Goodyear Dental Vulcanite Co.*, 93 U. S. 486, decided in 1876, see also our opinion on rehearing in *Grant Paper Box Co. v. Russell Box Company*, decided April 17, 1946); but only produced a better rayon blanket than had previously been known."

From this it will be seen that all members of the Court of Appeals below are in accord on the fact that all that the patentee had done was to substitute one known material for another (*uniform* length rayon fibers for *non-uniform* length rayon fibers) to produce an old product differing from what preceded it solely in *degree* and not in *species or kind*; and that disagreement arose between the members of the Court over the simple proposition of whether or not the effect of Rule 52(a) of the Rules of Civil Procedure vitiated and made inapplicable the *rule of law* established by this Court as early as 1850 and universally applied since that date (see the authorities cited in Point III hereof).

If the majority opinion of the Court of Appeals is allowed to stand as a precedent, the consequences thereof to existing and future patent litigation may not be foretold with any degree of certainty. It is certain, however, that the consequences will be disastrous in their effect upon the

public welfare. For example, no longer will there be any distinction between mere *novelty* and *patentable invention*, which latter, alone, under the Patent Statutes, warrants a valid patent grant which creates a monopoly adverse to the public right. In addition—and this is of far greater importance—the decision of a District Judge in a patent case, merely by finding “invention” as a *fact*, will put exclusively in the hands of District Judges final decision on the publicly vital question of patent validity, and preclude appellate review by making it “impossible” for Appellate Courts to say that the District Court’s finding was “clearly erroneous”. Thus, in the future the public will be deprived of the protection which this Court and the Courts of Appeals in recent years so frequently have found necessary to be accorded to it, by invalidating patents, for want of disclosure of invention, which unwarrantedly and erroneously had been held to be valid by inferior Courts.

It is submitted, therefore, that the petition for a writ of certiorari should be granted on this ground.

POINT III.

The Court of Appeals, in effect, has sustained as valid a patent which differs from what preceded it only in degree and not in species or kind, and therefore has rendered a decision which is in direct conflict with the applicable decisions of this Court.

It is believed that this point requires no further citation of authority than the two decisions of this Court cited by Judge WOODBURY in his minority opinion, namely, *Hotchkiss v. Greenwood*, 11 How. 248, and *Smith v. Goodyear Dental Vulcanite Co.*, 93 U. S. 486. However, it is believed that this Court cannot fail but be impressed by the large

number of cases to this effect collected and cited as established and unquestionable law in *Walker on Patents, Deller Edition* (Section 29, p. 179), and the 1944 supplement thereto.

Therefore, it is believed that the present petition should be granted on this ground if for no other purpose than to prevent the nullification of a long established *rule of law* by a *rule of procedure* which was formulated merely to expedite and simplify *proceedings* in the lower courts.

POINT IV.

The Court of Appeals has sustained as valid patent claims that fail to make a "full, clear, concise and exact" description of the alleged invention as required by Section 4888 R. S.

Both of the claims sustained by the Court of Appeals (Nos. 7 and 16, R. 267, 268), define the yarn used in the fabrication of the blanket of the patent as "consisting essentially of randomly intermingled staple artificial fibers". Although the patent nowhere defines what is meant by the term "staple", the Court of Appeals defined this term as meaning "a filament cut to a predetermined length * * * preferably 1" to 2" " (R. 411); and, as is made clear by the opinion of the Court, the provision of "staple" fibers, as thus defined, is the only point of novelty found by the Court by which the patent distinguishes from the prior art. Here is a vagueness and indefiniteness that is fatal to the validity of the claims.

Even if the Court's definition of the term "staple" is accepted, however, it at once becomes evident that the claims of the patent are still fatally vague and indefinite

at the exact point of novelty in that it is impossible to ascertain therefrom the limits of the monopoly purported to be established thereby—it is impossible to distinguish between what is purported to be monopolized and what is within the public realm free for use by anyone.

As above pointed out, both patent claims purport to monopolize a blanket formed of yarn consisting “*essentially*” of the “*staple*” fibers. *What proportion of the fibers present in the yarn must be of “staple” fibers so as to make the yarn consist “essentially” of such fibers?* Referring to the patent specification for enlightenment on this vital point, it is found that the only mention of the subject is contained in page 1, column 2, line 45 of the patent (R. 265) which states:

“The filling wrapping should include a *substantial proportion* of fibers of the length of $1\frac{1}{2}'' \pm \frac{1}{2}''$.”

Again the query is forced: *How many staple fibers must be present in order to comprise “a substantial proportion” of all of the fibers constituting the yarn?* The vital and necessary answer to these queries may not be found anywhere within the four corners of the patent.

The great significance of this fact, which fittingly illustrates the necessity for the strict requirement of the statute, is that, concededly, the wool-rayon blankets on the market long prior to the invention of the patent, and in which non-uniform short length fibers were used, *inevitably and necessarily included a very great many fibers of the lengths specified by the Court of Appeals as comprising “staple” fibers.*

It is obvious, therefore, that while, concededly, the public is entitled to the free utilization of *some* fibers of the lengths specified by the patent, some undetermined and undeterminable number of such fibers, at the whim of the

patentee, can be charged to constitute an encroachment on the monopoly purported to have been created by the patent claims. The consequence of this is strikingly illustrated by the fact, previously referred to, that a blanket made from *uniform* short length rayon fibers is indistinguishable from a blanket made from *non-uniform* short length rayon fibers. Indeed, no one, not even respondent's own expert at the trial of the case, on being shown the blanket (Exhibit 7) accused of infringement, could tell whether or not it contained a considerable percentage of "garnetted" rayon (fiber of *non-uniform* short length) mixed in with it (R. 244). In fact, and in order to save the case from dismissal for want of *prima facie* proof of infringement and thereby avoid the publicly important adjudication on validity, it was necessary to stipulate that Exhibit 7 "for the purposes of this case" should be considered as containing 100% "staple" rayon (R. 254-255).

The importance of strict compliance with the requirements of Section 4888 of the Revised Statutes as a protection to the public with respect to patents for *products* was recognized by this Court in *General Electric v. Webash*, 304 U. S. 364. However, it was not until the decision by this Court on November 18, 1946 in *Halliburton Oil Well Cementing Co. v. Walker*, that this Court's attention was centered upon the necessity of compliance with the statutory requirement with respect to patent claims for *combinations* as well. The claims of the Amory patent here involved are for *combinations*, and we believe that no case more effectively illustrates the necessity for the requirement of the statute and the strict compliance therewith than does the present case.

The noncompliance with the statute by the Amory patent was an issue which was most earnestly presented to

the Court of Appeals below (see Point on Appeal No. 9, R. 396) but was rejected by that Court, undoubtedly because of the belief of the inapplicability of this Court's decision in *General Electric v. Wabash* to combination claims.

This Court's decision in the *Halliburton* case was rendered long after the Court of Appeals for the First Circuit rendered its decision in the present case (July 19, 1946) and denied rehearing (October 7, 1946).

In consequence, the decision of the Court of Appeals in this case obviously is untenable in view of this Court's decision in the *Halliburton* case. Therefore, the petition should be granted on this ground.

POINT V.

The majority opinion of the Court of Appeals completely ignores the public interest present in this case.

In *Muncie Gear Works, Inc. v. Outboard, Marine & Mfg. Co.*, 315 U. S. 759 (at p. 768), this Court had occasion to refer to the:

“public interest sought to be safeguarded by the patent statutes and so frequently present but so seldom adequately represented in patent litigation.”

There can be no doubt but that litigation affecting the supply of blankets, thereby affecting the health and comfort of the members of the public, is possessed of an inherent public interest which requires no argument to establish. An unwarranted patent monopoly affecting wool-rayon blankets which afford all members of the public having modest incomes an inexpensive covering with the warmth, strength, durability and appearance of far more expensive

woolen blankets, and on such doubtful grounds as here form the basis for the majority opinion of the Court of Appeals below, should not be permitted without review by this Court.

Conclusion.

WHEREFORE petitioner earnestly prays that the petition for writ of certiorari be granted; the case be reviewed; and the judgment of the Court of Appeals for the First Circuit finding validity for claims 7 and 16 of Amory Patent No. 2,208,533 be reversed.

Respectfully submitted,

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